IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

THE STEAMBOAT EUGENE.
GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees.
JOEL P. GEER, *Claimant and Appellant.*
WALTER M. CARY, FRED M. LYONS, and EDWARD J. KNIGHT, named in the decree as intervenors, *Appellees.*

Second Brief for Appellant

STRUDWICK & PETERS,
WILLIAMS, WOOD & LINTHICUM,
Proctors for Appellant.

PORTLAND, OREGON
MULTNOMAH PRINTING COMPANY, SECOND AND YAMHILL
1898

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Brief for Appellant on Motion to Dismiss Appeal

Appellees have moved to dismiss the appeal: First, because, as they maintain, the decree appealed from is not a final decree; and second, on the ground that one C. Hennigar, mentioned in the decree of the District Court, is not joined as a party on the appeal. Upon the argument, the first point alone was urged, and we shall therefore confine ourselves, in the main, to a reply to that.

The decree is a final decree, and is set forth in full on pages 306, etc., of the printed record in this cause. The parties named in this title are all joined as appellant or appellees, and it is designated as a final decree. After various recitals, one of which is to the effect that the Eugene is liable in specie, it is decreed as follows:

"It is hereby ordered, sentenced and decreed, that the "said steamship Eugene, her tackle, apparel and furniture, "be and the same hereby are condemned for the payment "of the aforesaid amounts; to wit, for the payment of the "sum of eight hundred ($800.00) dollars to the libellant, "Gaston Jacobi, and for the further sum of eight hundred "($800.00) dollars to the libellant, Charles Ruff, together "with the costs and disbursements of this action, taxed at "the sum of dollars. And a stipulation having been "duly entered into and filed in this cause by the respective "parties, wherein it is stipulated and agreed that the inter-"venors, Fred M. Lyons, Walter M. Carey, and Edward "J. Knight, shall abide the result of the trial of the issues "between libellants and claimants herein, and shall be enti-"tled to the same recovery, upon their intervening libels "herein, as might be recovered by the principal libellants, "Jacobi and Ruff; therefore, in accordance with said stipu-"lation, and on motion of the proctor of said intervening "libellants, it is ordered, sentenced and decreed that the "said intervenor Fred M. Lyons have and recover herein the "sum of eight hundred ($800.00) dollars, and that the said "intervenor Walter M. Carey do have and recover herein a "like sum of eight hundred ($800.00) dollars, and that the "intervenor Edward J. Knight do have and recover a like "sum of eight hundred ($800.00) dollars, together with their "costs and disbursements herein, taxed at the sum of "dollars, and that the said steamship Eugene, her tackle, "apparel and furniture, be and the same hereby are con-"demned to the payment of the said sum.

" And it is further ordered that the claim of the intervening libellant, C. Hennigar, be reserved for such judgment or " order as the court deems just, upon such further hearing " as may be had upon the issues therein.

" And it is further ordered, adjudged and decreed that the " said steamship Eugene, her tackle, apparel and furniture, " be by the marshal of this district exposed for sale, and sold " at public vendue to the highest and best bidder for cash, " after due notice as provided by law and the rules and practice of this court, and that the said marshal pay the proceeds arising from such sale, after deducting the costs and " expenses thereof, into the registry of this court, there to " await the further order of the court in the premises as to " the distribution of the same; and to that end it is ordered " and decreed that the clerk of this court issue a decree of " venditioni exponas to the said marshal, returnable as required by the rules and practice of this court, and that the " said marshal execute the same and make return thereof " with all convenient speed. C. H. HANFORD, Judge."

The finality of a decree is to be determined by its effect upon the parties, and on the issues raised between them. If these issues are settled, and a sum is found due from one to the other, and execution of the decree is ordered, the decree is final and an appeal will lie.

The issues raised between the parties and presented upon the appeal have all been determined by the decree. Libellants proceeded against the Eugene for an alleged breach of contract for which they sought damages, each in a specified amount, and prayed that the boat be condemned and sold to pay the same. The appellant claimed the boat, and, on its behalf, contested libellants' right to proceed against the boat in rem, to sell the boat, and to recover damages. These were the issues.

The decree awards each of the libellants damages in the sum of $800.00; condemns the Eugene for the payment of

these sums in favor of libellants, and of equal sums in favor of the appellees, Lyons, Carey and Knight, whom it mentions as intervenors upon the same issues; and directs a writ of venditioni exponas to issue to the marshal for the sale of the boat under the decree, and that the marshal execute the same and make return thereof with all convenient speed. It is a complete determination by the District Court of the matters presented by the libel and answer. It awards a definite amount to libellants, decides that a maritime lien exists in their favor upon the Eugene, and directs the execution of the decree by a sale of the boat by the marshal under the admiralty process of the court. It is true that the decree directs that the net proceeds of sale be paid into the registry of the court, there to await the further order of the court as to its distribution. Such future order of distribution could, however, have no effect upon the award made under the decree itself. Claimant could no longer contest the right of appellees to the payment of their awards under the decree out of the fund so to be deposited; because the decree had fully settled and determined that, and was subject to review only by this appeal. The damages were fixed by the decree; and the boat was condemned therefor, and ordered sold in execution of the decree. Such a decree, as to appellant, is final.

Whiting v. Bank, 13 Peters, 6, 15.
The Alert, 61 Fed. Rep. 113.
Withenbury v. U. S., 5 Wall. 819.
Forgay v. Conrad, 6 How. 204.
Thomas v. Dean, 7 Wall. 342, 346.
R. R. Co. v. Bradleys, 7 Wall. 575.
R. R. Co. v. Soutter, 2 Wall. 440.
Hill v. R. R. Co., 140 U. S. 52.
Stovall v. Banks, 10 Wall. 583.
French v. Shoemaker, 12 Wall. 86.
Winthrop Iron Co. v. Meeker, 109 U. S. 180.

As is said by the Supreme Court in French v. Shoemaker, 12 Wall. 98: "Several cases might be referred to where it " is held that a decree of foreclosure and sale of mortgaged " premises is a final decree, and that the defendant is entitled " to his appeal without waiting for the return and confirma- " tion of the sale by an order, upon the ground that a decree " of foreclosure and sale is final as to the merits, and that the " ulterior proceedings are but a mode of executing the orig- " inal decree."

And the same court, in Thomas v. Dean, 7 Wall. 346, adopting its own language in Forgay v. Conrad, 6 How. 204, says: "And when the decree decides the right to the prop- " erty in contest . . . or directs it to be sold, or directs " the defendant to pay a certain sum of money to the com- " plainant, and the complainant is entitled to have such " decree carried immediately into execution, the decree must " be regarded as a final one to that extent, and authorizes " an appeal to this court."

And the Circuit Court of Appeals for the second circuit, in The Alert, 61 Fed. Rep. 115: "The decree was a final one " as between libellants and claimants. It directed the pay- " ment of a specified sum of money to the libellant by claim- " ant, and ordered its immediate execution."

In Withenbury v. United States, 5 Wall. 819, libels had been filed in the District Court for the condemnation, as prizes of war, of large quantities of cotton. The libels were consolidated and claims interposed as to the various lots. Withenbury, one of the claimants, denied the validity of the capture, and insisted on his title to 935 bales. His claim was dismissed with costs by the District Court, and execution ordered issued. From this decision he appealed; and the appellee moved to dismiss the appeal, on the ground that the decree was not a final one. The court says on page 821: "It appears from the record that the decree disposed " of the whole matter in controversy upon the claim of With-

" enbury and Doyle. It was final as to them and their rights, " and it was final, also, so far as the claimants and their rights " are concerned, as to the United States. It left nothing " to be litigated between the parties. It awarded execution " in favor of the libellants against the claimants." And the motion to dismiss was denied.

In Hill v. Chicago & E. R. Co., 140 U. S. 52, the District Court dismissed the bill against several defendants for want of equity, denied relief to complainant upon all matters in controversy except one item, referring the case to a master to ascertain that, and retained the case only as against the parties interested in that matter. On page 691 the court says: "The rights and liabilities of all the parties were in " other respects determined. But there was no adjudica- " tion as to the payment of the amount to be ascertained by " the master. That remained unsettled." And the court held that such a decree was a final one. "All the merits of " the controversy pending between them and the com- " plainant were disposed of, and could not be again reopened, " except on appeal from that decree."

In Railroad Co. v. Bradleys, 7 Wall. 575, the lower court rendered a decree ordering an injunction previously granted to restrain a sale under a deed of trust to be dissolved, and directed a sale according to the deed of trust and the bringing of the proceedings into court to abide further orders. The Supreme Court held such a decree to be a final one, from which an appeal would lie.

In Whiting v. The Bank of the United States, 13 Pet. 6, an appeal was taken from a decree of foreclosure and sale, and appellee moved to dismiss the appeal on the ground that the decree appealed from was not final. The language of the Supreme Court, on page 15, is especially pertinent, we submit, to this case. The court there says: "The original " decree of foreclosure and sale was final upon the merits of " the controversy. The defendants had a right to appeal

"from that decree, as final upon those merits, as soon as "it was pronounced, in order to prevent irreparable mischief "to themselves. For if the sale had been completed under "the decree, the title of the purchaser under the decree "would not have been overthrown or invalidated, even by a "reversal of the decree; and consequently the title of the "defendants to the lands would have been extinguished, and "their redress upon the reversal would have been of a differ-"ent sort from that of a restitution of the land sold."

If, in this case, the appellant should be obliged to wait until the sale of the Eugene under the decree of the District Court before this appeal could be taken, in the event of a reversal an irreparable mischief to himself would be occasioned; because the title of the purchasers of the boat under the decree of the District Court would not be overthrown or invalidated, even by a reversal of the decree.

Hennigar was not a necessary party to the appeal. He was not a libellant or a claimant. No issues have been raised as between himself and the parties to the appeal, and no decree has been rendered either in his favor or against him. It is not an appeal as to the Hennigar intervention which is before the court. All parties necessary or proper for the complete determination of every issue raised between the libellants, the so-called intervenors (Carey, Knight and Lyons), and the claimant are before this court, and every one whose rights are involved in this appeal is a party to it.

Where a decree is several, both in form and substance, and the interest of each defendant thereunder is separate and distinct from that of the other, one defendant may appeal alone without a summons and severance, or equivalent proceeding.

Gilfillan v. McKee, 159 U. S. 303.

In the present case, Hennigar is neither a libellant nor a respondent. His action is based upon repairs made upon the Eugene (record, page 11)—a matter entirely separate

and distinct from the causes of action of the appellees. The appeal is taken from that part of the decree awarding damages to the appellees, which is separate and complete in itself.

The intervening libel of Hennigar was not prosecuted to a determination. On the contrary, the proctor of record for Hennigar, prior to the rendition of the decree appealed from, filed a praecipe for the dismissal of such libel of intervention. (Record, page 41.)

For the above reasons, we respectfully submit that the motion to dismiss should be denied.

Reply Brief for Appellant on the Merits

We shall confine ourselves in this portion of our brief strictly to answering the brief for the appellees; and, in the main, to calling the attention of the court to the differences between the facts as stated by the appellees and those disclosed by the record on appeal.

We admit that the Eugene was in the possession of the Portland & Alaska Trading & Transportation Co. at the time of that company's dealings with appellees. She was not, however, at Seattle, where they dealt, or at any point within the state of Washington, but in Oregon, a different jurisdiction; and appellees dealt, not with the vessel and with persons apparently in charge of her, but with a corporation upon whose responsibility they relied, and with which they personally contracted, on the faith of the responsibility of such corporation. The credit of the Eugene did not enter into the contract at all. They had never seen that vessel, which was several hundred miles away, in another state.

In reply to "b," page 11:

There is no testimony even tending to show that appellant and the owners of the Eugene ever knew that the Portland & Alaska Trading & Transportation Co. held itself out as the owner of the vessel, or that they consented to any such misrepresentation. Indeed, it plainly appears to the contrary. In the advertisements published by that corporation, without the knowledge or authority of the owners of the Eugene, that corporation was not held out as the owner. Libellants' Exhibit E (Supplemental Record, page 13) reads: "The steamer Eugene, under the management of the P. & "A. T. & Tr. Co." Libellants' Exhibit G (page 15) reads: "This company secured the Willamette river steamboat "Eugene."

The statements in the Davidge contract as to the ownership of the Eugene were known neither to appellant nor to the appellees, and neither of them were parties to the contract; and it could have no effect upon the rights of the former.

In reply to "c," page 12:

It is not true that appellant has admitted that the Portland & Alaska Trading & Transportation Co. had the right and authority to employ the Eugene in the manner in which appellees contend she was employed. The testimony quoted on page 12 of appellees' brief is that of Jones, not of Geer, and must be read in connection with the remainder of Jones' testimony. It is found on page 269 of the record, and is preceded by the following questions and answers, on cross-examination:

"Q. Did the McGuires or the Transportation Company, "so far as this expedition was concerned, and the sale of "tickets and passengers here, that was no breach of their "contract with you, was it?"

"A. I don't know anything about the sale of tickets.

"Q. Do you claim that contract was broken by the sale "of tickets to passengers or the attempt to transfer passen-"gers from here to Dawson City?

"A. They did not attempt to transport any passengers "on the Eugene."

Upon re-direct examination, this witness testified as follows (record, p. 273):

"Q. Do you know anything about the method or man-"ner in which McGuires, Davidge or anybody sold tickets "here in Seattle? Do you know anything about the way "in which they sold them to persons?

"A. No; all I know about it is what I heard. I just "heard—they told me they were selling them on the Bristol "to go to St. Michael's, and from St. Michael's they were "to be transferred to the Eugene, if they got her up there.

"Q. Now, you don't know yourself much about how "these transactions were had by the Portland & Alaska "Trading & Transportation Company with these passen- "gers?

"A. No, I do not.

"Q. Of your own knowledge?

"A. No, I don't know anything about it; I know in "Portland how they were offering to sell them to passen- "gers.

"Q. What were they doing there?

"A. Why, when I have been in there, the passengers "have asked them, suppose they didn't get through with "the Eugene, what they were going to do with them, and "they told them they would have to take the same chance "as well as themselves, but they expected to get her "through; they thought there would be no doubt but what "they would get her through, but they could not guarantee "against any elements.

"Q. Did you ever authorize or did the owners of the "Eugene ever authorize the Portland & Alaska Trading & "Transportation Company to warrant that the Eugene "would arrive at St. Michael's?

"A. No, sir.

"Q. Or to sell tickets on the Eugene to begin at any "other point than St. Michael's, if she got there?

"A. No, sir, I did not.

"Q. Did they have any authority to deal with the "Eugene other than as embraced in these two contracts?

"A. No, sir, not that I know of. I had been dealing "with them myself pretty much; they didn't have any author- "ity to deal in any other way than as in these contracts.

"Q. From what point to what point did they have "authority to sell tickets on the Eugene?

"A. From St. Michael's to Dawson City."

And the appellant Geer testified (record, page 258):

"Q. They had the use of this vessel for that voyage, and "whatever legal business they chose to carry on, did they "not?

"A. They had the use of the vessel from the mouth of "the Yukon to Dawson City.

"Q. And from Portland up, did they not?

"A. They were not to use the vessel from Portland up "for any purpose."

The testimony on behalf of appellant is clear and explicit to the effect that all that the Portland & Alaska Trading & Transportation Co. was authorized to do was to use the Eugene on the Yukon river from St. Michael's to Dawson, provided she reached that river; and that said corporation was not authorized to bind the boat to reach the river.

In reply to "d," page 13:

Geer was on the Eugene, and not on the Bristol, during the trip, and could not know what took place on the latter vessel.

In reply to "e," page 13:

Jones was an incorporator of the Portland & Alaska Trading & Transportation Co., but he owned no stock, signed the papers for accommodation only, was not an officer, and had no part in the management. Consequently he was not a party to the contracts of that corporation with appellees. Even were he such a party, the fact of his being a stockholder of the corporation owning the Eugene would not make the latter corporation a party to such contracts.

As to the authorities cited by appellees on pages 14 and 15 of their brief:

Section 4286, Revised Statutes, from which appellees quote at some length, forms a portion of the act limiting the liability of owners of vessels, and places the owner operating his own vessel and a charterer operating a chartered vessel in the same position with reference to a limitation of liability. It has no application to the case now under consideration.

The doctrine laid down in The City of New York, 3 Blatchf. 187, has been overthrown by the Supreme Court in The Kate, 164 U. S. 458, which holds that no liability exists for supplies furnished upon the order of a person known as charterer, or who by the exercise of reasonable diligence could have been known as such.

We do not dispute the correctness of the decision in The Freeman, 18 How. 182, cited by appellees, but we submit that it has no application to this case, as a person seeking to enforce a maritime lien by virtue of a contract with one not the owner in fact, or the master, must show that he dealt with the vessel upon the credit of the vessel, and that the vessel either received the benefit of the supplies, or, in the case of a contract of affreightment, that the goods were laden on the vessel.

We strenuously dispute the correctness of the alleged summary of facts contained in appellees' brief, on pages 17 et seq., in the following particulars:

Francis B. Jones was not interested in the Portland & Alaska Trading & Transportation Co.

A part only of the crew of the Eugene was hired and paid by the Portland & Alaska Trading & Transportation Co.

The Eugene was to be used by the Portland & Alaska Trading & Transportation Co., not in the Alaskan transportation business, but only for one trip upon the Yukon river, beginning at St. Michael's and ending at Dawson City.

C. W. Gould, who sold the tickets at Seattle to appellees, was not the agent of the Portland & Alaska Trading & Transportation Co., but the representative of Davidge & Co., the charterers of the Bristol; and the expedition, so called, was not an expedition of the Eugene from Seattle. The poster (supplemental record, p. 9), introduced on behalf of appellees, reads:

"To Dawson City this year! The s. s. Bristol to St.

" Michael's, and steamer Eugene, St. Michael's to Dawson " City direct. * * * C. W. Gould, Agt."

The advertisements published in the Seattle newspapers were so published without the knowledge of the owner of the Eugene or of her master, and at a time when the vessel was herself in a different jurisdiction.

Appellees did not contract in reliance upon these advertisements, and the advertisements form no part of their contract, which are sufficiently and unmistakably evidenced by the three tickets issued to each passenger—one good from Seattle to Victoria, one from Victoria to St. Michael's, and one from St. Michael's to Dawson City.

We furthermore submit that the advertisements themselves show that they did not refer to a trip on the Eugene from Seattle to Dawson. The heading of Appellees' Exhibit "D" (supplemental record, page 12) reads:

" For Dawson City direct. The Bristol is preparing to " make a record-breaking trip into the Yukon."

" E": "For Dawson City: Passengers will take the " Bristol for St. Michael's."

" F": "Eugene for Dawson City. Will take the Bristol's " passengers up the Yukon river."

" To make a fast voyage. The steamship Bristol's trip to " the mouth of the Yukon river."

" G": "The Bristol next."

" H": "They go tomorrow. The Bristol's passengers " to Dawson City direct."

" I": "The Bristol tonight."

"J": "Off for the mines. A big crowd left last night to " go on the Bristol."

There are no representations that the Portland & Alaska Trading & Transportation Co. owned the Eugene. If there were, they were unknown to and unauthorized by her owner.

The fare was $300.00 through to Dawson, but the tickets

were separate. Through tickets are regularly sold and bills of lading issued on this coast for points in Europe, via Atlantic steamers; but these steamers are not bound by any such contracts until they themselves receive the passenger or freight.

The Bristol, by the contract, was to convoy (not tow) the Eugene, for the better enabling the latter to arrive at St. Michael's, where her voyage was to begin.

The passage-money was paid to Gould, the chosen representative of Davidge & Co., who, out of the total moneys received, kept $15,000.00 for the Bristol, and then paid the surplus to the Portland & Alaska Trading & Transportation Co.

The Eugene never assumed control of the passengers' outfits, nor did her master nor any one authorized by her to do so.

The plans as to the starting point of the Bristol were never changed. She being a British vessel, she could not leave Seattle for St. Michael's, both points being within the United States.

The transportation of the passengers to Comox was paid by Davidge & Co. (Record, p. 200.)

Although Mr. McFarland, of the Portland & Alaska Trading & Transportation Co., was on the Bristol, the alleged expedition was managed by the master and purser of the Bristol, except in so far as the passengers on the Bristol, including appellees, ran things themselves. Appellees were never on the Eugene as passengers. No outfits of passengers were ever put on the Eugene. Those of the crew of the Eugene were transferred to the Bristol at Comox.

The letter of McFarland, referred to on page 20 of appellees' brief, shows that the passengers were those of the Bristol, and not of the Eugene.

Appellees' Authorities:

Price v. The Thos. Newton, 41 F. R. 106, was a case in which goods were delivered to an agent of a vessel at her regular landing place, where she herself was to take them. The goods were there receipted for by the agent on behalf of the vessel. The dock at which appellees' goods were placed, in the case at bar, was the landing place of another boat, some two thousand miles distant from the port at which the Eugene was herself to receive them. It might be a common law delivery sufficient to bind the Portland & Alaska Trading & Transportation Co., but it is preposterous to claim that it was such a delivery as would support a maritime lien, which is stricti juris, as against the Eugene.

In Bulkley v. Cotton Co., 24 How. 386, the master receipted for the goods, which were lost while on the lighter; and the receipt by the master and his acceptance of the goods in this manner were held sufficient. In the case before this court, the master never saw the goods, much less received them on behalf of the vessel.

In The Oregon, Deady, 179, the vessel paid the lighter, and the master of the Oregon treated the other vessel as in his employ, controlling her movements. The freight was landed at the wharf designated by the master for unloading the goods in order to physically receive the goods aboard the Oregon, and such delivery, being in the presence of the officers of the Oregon, was held by the court to be a delivery to her, especially as the vessel receipted for the goods.

As shown by the cases cited in our opening brief, The Pacific, 1 Blatchf. 569, has been overruled by the Supreme Court.

Appellees fail to recognize the distinction between delivery to a common carrier and such delivery to a ship as is sufficient to bind the ship. Receipt by an agent is sufficient to bind the carrier personally, but only delivery to the vessel

herself, either actual or such delivery as is equivalent to actual delivery, can bind the vessel herself.

It is lastly insisted by appellees that Carey, Lyons and Knight were properly before the court as parties, and that the decree in their favor was regularly rendered, with appellants' consent. We submit that such is not the fact.

The record, pages 366 and 367, shows indorsements on the alleged intervening libel, as follows:

"Intervening libel of Walter M. Carey et al. Presented "and offered for filing in my office, and fee for filing paid to "me, November 6, 1897, but withheld from filing awaiting "stipulation for costs. R. M. Hopkins, Clerk, by H. M. "Walthew, Deputy." And a similar certificate is given by the clerk as to the praecipe for appearance. (Record, page 367.)

No stipulation for costs was ever filed by these alleged intervenors, and their libel was never filed by the clerk. The transcript on appeal, filed in this suit, certified to by the clerk of the District Court as containing the complete record of the case in the District Court, does not include the intervening libel, for the sufficient reason that such libel was never filed.

Admiralty Rule 34 of the Supreme Court provides as follows: "But every such intervenor shall be required, upon "filing his allegations, to give a stipulation, with sureties, "to abide by the final decree rendered in the cause, and to "pay all such costs and expenses and damages as shall be "awarded by the court upon the final decree, whether it is "rendered in the original or appellate court." This rule wisely provides, for the protection of both officer and adverse party, that the stipulation for costs is a prerequisite to the filing of an intervening libel. No such stipulation having been given, the clerk properly refused to file the libel; keep-

ing it in his custody, and not as part of the records of the District Court, until the stipulation should be given. And as no stipulation was thereafter given at any time, the libel never was filed by the clerk.

We submit that the decision of this court in Mutual Life Ins. Co. v. Phinney, 76 Fed. Rep. 617, is decisive to the effect that under such circumstances the custody of the paper does not constitute filing, and that the District Court was without jurisdiction to render any decree in favor of the alleged intervenors. In that case, the writ of error was delivered by appellant to the clerk of the lower court, but was not indorsed as filed, for the reason that the clerk deemed that it should be actually indorsed by the clerk of the Circuit Court of Appeals. Notwithstanding the fact that the writ of error and citation were actually delivered to and filed and lodged with the clerk of the Circuit Court, yet this court held that actual indorsement of the papers as "filed" was essential, and that without such indorsement it had no jurisdiction.

The facts in that case were far stronger than in the one now before this court. In that case, the intent to file existed in the minds of both party and clerk, and the latter neglected to make the indorsement, for the reason that he considered every requisite had already been complied with. In this case, the clerk refused to file until the party complied with Admiralty Rule 34 by giving the stipulation therein required.

It is insisted by appellees that, by reason of the stipulation on page 368 of the record, the objection of appellant as to Carey, Lyons and Knight comes too late, and cannot now be heard. A waiver by a stipulation on a matter substantially affecting the rights of a party must, we submit, be apparent upon its face. The stipulation does not name any intervenor; and consequently, we submit, it cannot preclude appellant from such objections.

Moreover, consent cannot confer jurisdiction; and where parties are not before the court by the filing of their libel, the appearance of the adverse party cannot of itself give the court jurisdiction. Irregularities in process may be waived by a general appearance; but where, as in this proceeding, no suit has been instituted, we submit that Carey, Lyons and Knight were not before the District Court, and they could not be brought into court by the stipulation, conceding to the latter all the effect claimed for it by appellees.

Respectfully submitted.

STRUDWICK & PETERS,
WILLIAMS, WOOD & LINTHICUM,
Proctors for Appellant.